



digitalcommons.nyls.edu

Faculty Scholarship

Articles & Chapters

2007

Culture, Power, and Law: Thinking About the Anthropology of Rights in Thailand in and Era of Globalization

Frank W. Munger
New York Law School

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

51 N. Y. L. Sch. L. Rev. 817 (2006-2007)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

FRANK MUNGER

Culture, Power, and Law: Thinking About the Anthropology of Rights in Thailand in an Era of Globalization

ABOUT THE AUTHOR: Frank Munger is a Professor of Law at New York Law School. This essay is a revised version of a talk prepared to reflect the theme of New York Law School's 2006 Faculty Presentation Day — celebrating 50 years of the *New York Law School Law Review* — by taking Sally Engle Merry's essay, published in the *Law Review* in 1992, as its starting point. This essay was intended primarily for a student audience and conceived as an introduction to a profound and important area of research to which Professor Merry has made major important contributions. She is among the best-known American law and society scholars, has made numerous major contributions to legal anthropology, and is especially well known for her scholarship on the relationship between "legal consciousness" and access to rights. As the author explains in his essay, he believes that Professor Merry's latest work on the globalization of a human rights convention on violence against women can be equally instructive for him and other scholars, as well as for students and their scholarship to come. The author thanks Cory Blitz for his valuable assistance in conducting research for this article. This material is based in part upon work supported by The National Science Foundation under Grant No. 095690. Any opinions, findings, and conclusions expressed in this article are those of the author and do not necessarily reflect the views of The National Science Foundation.

I. INTRODUCTION: RIGHTS AND THE PROBLEM OF GLOBAL TRANSPLANTATION

Advocacy for human rights, democracy, and the rule of law is sweeping the globe and reshaping governance in developing societies.¹ Societies influenced by this tidal wave have their own legal cultures, and many have had limited experience with popular participation in government or accountability under law. The global rights discourse is often welcomed by advocates within these societies, although the legal reforms it inspires are imposed from above through treaties, international conventions, or domestic legislation and constitutional reform. The architects of change say that reforming the law will “grow” a civic culture supporting public involvement and government accountability,² but is such an expectation well founded where the particular institutions or programs, and perhaps the ideas themselves, have been transplanted from societies where their form and function have been shaped by a long history? American legal anthropologist Sally Engle Merry is a leading ethnographer of rights.³ Her research examines how law becomes an active element in the ongoing life of ordinary communities. She has also studied globalization, most recently the grassroots effects of a human rights treaty on gender violence. Her research both illuminates the risks of transplantation and suggests a path to pursue in answering this question.⁴

In this essay I first describe a globalization project of my own, and then I turn to Professor Merry’s seminal essay on “legal consciousness,” published in this *Law Review* in 1992 for guidance.⁵ I also describe her recent book on the implementation of the United Nations’ Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), which provides a helpful model of her method at work. The essay concludes with further questions about my own project and the challenges of understanding how law can be used to protect basic rights in any society.

-
1. Some of these societies include Hawaii, Delhi, Beijing, Fiji, and Hong Kong.
 2. For example, the World Bank’s most recent development initiatives have contained a substantial rule of law component. The World Bank claims, for example, that “good governance and strong public institutions lie at the core of achieving sustainable development” and “there is growing evidence that countries with vibrant civil societies are more likely to build more equitable and sustainable patterns of development,” where “helping governments strengthen their legal, regulatory, political, and institutional frameworks” contributes directly to this goal. See World Bank, Civil Society — World Bank Development Approaches and Initiatives, <http://go.worldbank.org/FWZHYU3220> (last visited Jan. 25, 2007).
 3. Sally Engle Merry is a Professor of Anthropology at New York University and the author of numerous influential books and articles on the anthropology of rights, including: SALLY ENGLE MERRY, COLONIZING HAWAII (Sherry B. Ortner, Nicholas B. Dirks & Geoff Eley eds., 1944); SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING CLASS AMERICANS (1990); Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869 (1988); Sally Engle Merry, *Spatial Governmentality and the New Urban Social Order: Controlling Gender Violence Through Law*, AM. ANTHROPOLOGIST, Mar. 2001, at 16 (2001); Sally Engle Merry, *Transnational Rights and Local Activism: Mapping the Middle*, AM. ANTHROPOLOGIST, Mar. 2006, at 38.
 4. See generally SALLY ENGLE MERRY, HUMAN RIGHTS & GENDER VIOLENCE TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (2006).
 5. Sally Engle Merry, *Culture, Power, and the Discourse of Law*, 37 N.Y.L. SCH. L. REV. 209 (1992).

II. THE RULE OF LAW AND THAILAND'S CONSTITUTIONAL MOMENT

The meaning of “rule of law” is itself the subject of an enduring debate in our own society.⁶ Minimally, rule of law implies observance of known rules and procedures for exercising government authority.⁷ While in our own society we associate the rule of law with accountability for observance of substantive principles, such as those contained in the Bill of Rights, as well as with observance of rules, observance of rules on its own has benefits even for the dictator who desires to hold subordinates and subjects to account. This “thin” version of the rule of law can have the ironic effect of undermining the legitimacy of attempts to increase the responsibilities of the sovereign or expand the rights of citizens on the grounds that neither the process of change nor particular proposals for change are in accord with existing law-based prescriptions.⁸

In Europe, the United States, and other established democracies, a “thick” version of the rule of law includes principles of accountability that apply to the sovereign.⁹ This version is sometimes referred to as “liberal legality,” which combines observance of rules with restraints on the sovereign in the form of substantive and procedural rights enjoyed by citizens and their privately created entities (such as corporations).¹⁰ This “thick” version of the rule of law is attractive to human rights advocates and to many citizens in societies in which government is not responsive to popular will.¹¹ Liberal legality is also promoted in developing societies by powerful international organizations and political actors like the World Bank and the United States, which believe that adoption of human rights and mechanisms of accountability will make governments more stable and market friendly.¹²

My research project concerns the effect of formal “thickening” of democracy and rights under Thailand’s most recent constitution. In December 2005, King

6. See BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004); see also DAVID HELD, *MODELS OF DEMOCRACY* (1996).

7. See TAMANAHA, *supra* note 6, at 92–93.

8. My colleague, Ruti Teitel, has made such an argument about the ironic effects of the rule of law on transitional justice. See RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 21 (2000).

9. See generally TAMANAHA, *supra* note 6, at 102–13.

10. See Stuart Scheingold, “*The Dog That Didn’t Bark*”: *A Sociolegal Tale of Law, Democracy, and Elections*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 526 (Austin Sarat ed., 2004).

11. As Tamanaha notes, the “thick” version — liberal legalism — has strongly anti-democratic implications when individual rights conflict with the political power of the majority. See TAMANAHA, *supra* note 6, at 111. Some progressive human rights advocates argue that the restrictive implications are expanding as neoliberal governments in Europe and America shrink the public sector through privatization and deregulation, thereby expanding the scope of private rights. See Boaventura de Sousa Santos, *Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARD A COSMOPOLITAN LEGALITY* 29 (Boaventura de Sousa Santos & Cesar A. Rodriguez-Garavito eds., 2005).

12. See TAMANAHA, *supra* note 6, at 136.

Prajadhipok's Institute ("KPI") in Bangkok sponsored a conference on the progress of electoral democracy in Thailand.¹³ King Prajadhipok was Thailand's last absolute monarch, abdicating under pressure in 1932 and replaced by a constitutional democracy. Although a lifelong opponent of this change, King Prajadhipok left an ironic legacy in his written abdication, bequeathing his power — in spirit if not in law — to the people of Thailand rather than to the government that would succeed him. It is in memory of this legacy that the Institute carries on its democracy research.¹⁴ In 1997, Thailand experienced another constitutional moment, the successful conclusion of five years of contentious constitutional reform following a military coup in 1991, bloody riots, and restoration of elected government in 1992. The coup itself was at first supported by the Thai people because the democratically elected government that was deposed was highly corrupt. But the military did not step down once the corrupt politicians were removed; instead, the generals showed every sign of continuing their repressive regime. The Thai people, especially the citizens of Bangkok, rebelled, organizing large demonstrations that were suppressed by force. This was not the first occasion on which the Thai had rebelled against military rule, but something new was indeed taking place. This time the rebellion was viewed on a global stage as the world watched nightly on CNN.

The story of this recent evolution is truly remarkable. The current king, Bhumibol Adulyadej, who is revered above all other authorities in Thailand though he has little formal power, called the leaders of the military and the demonstrators to the throne room where they prostrated themselves.¹⁵ Civilian rule was restored soon after, and the process of drafting Thailand's sixteenth constitution began. By popular demand, the constitution was drafted by a committee of experts rather than by politicians. The final draft contained an extensive bill of rights, mandates for popular participation in government, new agencies to oversee elections and to punish corrupt officials, and a mandate for devolution of power to democratically elected local governments.¹⁶

Parliament and career central administrators were opposed to the constitution and would have blocked or weakened provisions guaranteeing the "right to have rights," stronger democracy, and greater accountability by rewriting the commission's draft if they had been left to their own devices. But the coincidental

13. Robert B. Albritton, *Consolidating Democracy in Thailand: The First Four Years of Democracy under the Constitution of 1997*, Address at King Prajadhipok's Institute's Seminar on the Temperature of Democracy and Election Behavior in Bangkok, Thailand (Dec. 23, 2005).

14. See Cornell University, *Siam's Political Future, The Monarchy In Transition*, <http://instruct1.cit.cornell.edu/courses/hist244/Batson9.html> (last visited Jan. 25, 2007); cf. Kevin Hewison, *Introduction: Power, Oppositions, and Democratisation*, in *POLITICAL CHANGE IN THAILAND: DEMOCRACY AND PARTICIPATION* 1, 11–12 (Kevin Hewison ed., 1997).

15. Hewison, *supra* note 14, at 2.

16. See CONST. OF THE KINGDOM OF THAIL., B.E. 2540 (1997), especially, but by no means limited to, §§ 26–65, 236–247.

collapse of the Thai bhat in 1996 thwarted their plans to reject most of the reforms.¹⁷ International agencies, principally the World Bank and the Asian Development Fund, imposed “structural adjustment” as a condition of bailout, including new laws to regulate the market.¹⁸ Their intervention also sent a clear message not to derail the so-called “People’s Constitution,” and the military ultimately agreed by supporting adoption as written after the draft constitution received an overwhelming vote of approval in a popular referendum.¹⁹

This history is complex, and it includes international flows of information, ideas, resources, and influence at many levels as well as the Thais’ own diverse and complex conceptions of governance and rights.²⁰ After re-electing billionaire businessman Thaksin Shinawatra Prime Minister by an overwhelming majority in 2005, the BBC reported in mid-April 2006 that crowds of protesters in the capital city kept the Prime Minister, now viewed as corrupt, from entering his office, provoking a threat of military reprisal. Shinawatra had a history of treating some popular protesters harshly and using the military to suppress and harass demonstrators in the Muslim South and elsewhere; although this is not what brought the protesters into the streets. A leading human rights lawyer who represented the Muslim leaders was harassed through defamation suits brought by Shinawatra’s family for statements he made as an advocate. In 2004, the lawyer was abducted and murdered, although the government claimed no connection with the perpetrators. In 2006, Shinawatra resigned as Prime Minister amid charges of corruption (but remains as “caretaker” until new elections are held) rather than face a vote of no confidence.²¹ These recent events suggest that rights and democracy still face challenges in Thailand.

The hypothesis that the constitutional change will grow a classic civic culture has been tested through survey research presented at the KPI conference.²²

17. Andrew Harding, *South East Asia, 1997-2003: Two Case Studies on the Politics of Law and Development*, in *GLOBALIZATION AND RESISTANCE: LAW REFORM IN ASIA SINCE THE CRISIS* (Christoph Anton, ed., forthcoming Apr. 2007), available at <http://www.law.uvic.ca/seals/forums/attachment.php?s=B30a02ae3f1919c6e42d13e430051d5&attachmentid=6>.

18. Nobuyuki Yasuda, *Law and Development from the Southeast Asian Perspective: Methodology, History and Paradigm Change*, in *LAW AND DEVELOPMENT IN EAST AND SOUTHEAST ASIA* 45, 47-52 (Christoph Antons ed., 2003). See generally Harding, *supra* note 17.

19. See CHRIS BAKER & PASUK PHONGPAICHIT, *A HISTORY OF THAILAND* 255-57 (2005).

20. For example, the Constitution repeatedly refers to government as “the democratic regime of government with the King as Head of the State.” See CONST. OF THE KINGDOM OF THAIL., B.E. 2540 (1997). The monarchy is central to the people’s allegiance, and it is the only aspect of constitutional life that has not been subjected to reform. See generally Hewison, *supra* note 14.

21. See Wikipedia, Thaksin Shinawatra, After the April 2006 Election, http://en.wikipedia.org/wiki/Thaksin_Shinawatra#Thaksin_proposes_reconciliatory_panel (last visited Nov. 9, 2006) (summarizing sources, largely newspaper articles, describing the elected PM’s status as self-proclaimed “caretaker” head of government).

22. See Robert B. Albritton, *Consolidating Democracy in Thailand: The First Four Years of Democracy under the Constitution of 1997*, Paper delivered at the International Political Science Association Meeting, Fukuoka, Japan (Jul. 12, 2006).

Surveys of popular opinion show that the Thai people understand what democracy is and that they strongly embrace the electoral process.²³ But quite contrary to the classic concept of a civic culture, the Thai people also expressed little tolerance for give and take among opposing political views or for political diversity. Further, widespread vote buying, easily documented in other ways, went largely unreported when respondents were asked about their knowledge of corruption. Better educated, urban Thai were surprisingly skeptical of democracy and intolerant while rural, less educated Thai overwhelmingly supported democracy (but not necessarily the rights of others).²⁴ These survey results raise questions about the kind of civic culture growing in Thailand, but do not answer more pressing questions about law — whether rights are observed, whether policies are more egalitarian, whether office holders are more accountable, and generally whether law is a meaningful presence in Thai citizens' daily encounters with government and each other — all goals of activists who promoted the changes. My ambition as a scholar is to conduct empirical research on these questions through further surveys and case studies of the impact of new rights and democratic reforms mandated by the constitution.

Ironically, as emerging market societies are pressured to stabilize their economies by securing individual and property rights through more regulation and the rule of law, criticism of government and regulation in developed western societies has intensified, also in the name of strengthening markets. Pro-market critics of developed democracies argue that governments are too large and inefficient and should give way to the private sector and to international treaties embodying the rules of the global market.²⁵ The pressure for economic growth has given the discourse of rights different faces in the global North and global South — advocating downsizing the public domain and social citizenship in developed societies at the very moment when the public domain and responsiveness to public welfare are being promoted through democratization and expanding the rule of law in developing societies. How the two faces of this discourse about the rule of law in the global economy interact remains to be studied. Of course, the goals of many human rights advocates contrast with both of these views of market development in that they seek protection from exploitation and oppression rather than more rapid economic development.

Some scholars view the spread of democracy, decentralization, and the rule of law in societies with emerging economies as an imperialistic movement of

23. See generally Robert B. Albritton & Thawilwadee Bureekul, *Developing Democracy Under a New Constitution in Thailand* 6 (Asian Barometer: A Comparative Survey of Democracy, Governance, and Development, Working Paper No. 28, 2004).

24. See *id.* at 17.

25. See ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* (2004).

culture and institutions from the global North to the global South.²⁶ Other advocates, including Nobel Prize-winning economist Amartya Sen, argue that democracy and the rule of law make policy decisions more egalitarian,²⁷ while still others maintain that democracy, now a global ideal, will make difficult choices in a developing society more legitimate.²⁸ Many scholars have warned of what they call “transplant” risks,²⁹ namely the risk that regulation and governance programs established in western societies will have different meaning and unpredictable effects when transplanted to other societies. The existence of such risks is supported by studies showing that the meaning and effects of rights are closely related to variations in culture and context, even in societies in which rights and the rule of law are said to be well established.³⁰

-
26. Indeed, an important factor fueling these changes is pressure from international finance and development institutions such as the World Bank and the International Monetary Fund, which offer financial assistance to countries with failing economies in exchange for “structural adjustments,” including promises to reduce expenditures for domestic social programs, to reduce inflation, and to use all available resources to pay off loans by foreign investors. Major political and economic actors, such as the United States, also advocate adoption of market friendly reforms including laws regulating markets for the benefit of investors, bankruptcy law, and protection of intellectual property, property rights held mostly by U.S., and European-owned transnational corporations. “Third wave” globalization also includes pressure by powerful global market participants for adoption of institutions of political accountability familiar in developed western societies to counter a perceived inability of governments in many emerging market societies to control instability, extreme inequality, and corruption. Boaventura de Sousa Santos & César A. Rodríguez-Gravito, *Law, Politics, and the Subaltern in Counter-hegemonic Globalization*, in *LAW AND GLOBALIZATION FROM BELOW* 1, 2 (Boaventura de Sousa Santos & César A. Rodríguez-Gravito eds., 2005). See generally MICHAEL GOLDMAN, *IMPERIAL NATURE: THE WORLD BANK AND STRUGGLES FOR SOCIAL JUSTICE IN THE AGE OF GLOBALIZATION* (2005); JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2003).
27. See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).
28. See generally 1 WORLD BANK, *THE WORLD BANK LEGAL REVIEW: LAW AND JUSTICE FOR DEVELOPMENT* (Rudolph V. van Puymbroeck ed., 2003).
29. See MERRY, *supra* note 4, at 19, 134–39.
30. A particularly controversial claim about transplantation risks has been made by leaders of some developing Asian societies who claim that an authoritarian, non-democratic path to development is consistent with “Asian values,” and that Western “liberal” values are inappropriate and harmful for their societies. See generally *ASIAN DISCOURSES OF RULE OF LAW THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S.* (Randall Peerenboom ed., 2004); *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* (Joanne R. Bauer & Daniel A. Bell eds., 1999). The distinction is sometimes drawn between individual rights and collective rights. As Professor Merry has pointed out, the distinction itself is specious — often depending on the source of the benefits that the rights holder is to enjoy rather than a difference in the group nature of the interests at stake. E-mail from Sally E. Merry, Professor of Anthropology and Law and Society, N.Y. Univ., to author (Jun. 14, 2006, 10:21 EST) (on file with author). Thus, voting, freedom of speech, and ownership of property are said to be individual, while a right to housing, food, or an education is viewed as a different order; even though both are meaningful only because they are widely, and at best universally, enjoyed thus shaping the quality of the society as a whole as well as the lives of individuals. Critiques of the Asian values claim by scholars in the East as well as the West are well established, pointing to the overlap between societies and diversity within societies. The Asian values claim is often made to legitimate traditional forms of hierarchical and non-democratic authority, thus deriving the legitimacy of authoritarian rule from traditional respect for family and community. There is no necessary link between these levels of social organization, and indeed,

In the remaining parts of this essay, I will describe a path for my research on the effects of transplanted legal institutions, taking as my starting point a foundational discussion of “legal consciousness.”³¹

III. THE LOCAL CONTEXT OF LAW

It comes as no surprise to law students that the law does not always seem to play out as the words in the constitution, statutes, or court decisions might at first suggest. Law students quickly learn to live with ambiguity because ambiguity, as well as the illusion of certainty, is essential to the law’s power in the hands of an advocate. Creating meaning through purposive construction and contextual understanding is the lawyer’s art. We learn that multiple meanings are always possible, and any one of them may become the authoritative meaning when we are successful advocates, despite how stable the law seems in our everyday world.

In everyday life, law often has texture, a feel of continuity, and a reassuring, if unarticulated presence that is undisputed because it is taken for granted. As one pair of scholars observed recently to illustrate this point, “we respect our neighbors’ property because it is *theirs*.”³² We speak openly and in public to one another about what we like or dislike about those in power because we are *free* to do so. More tentatively perhaps, we are indignant with police or motor vehicle department clerks when they violate our expectation of *responsive and responsible conduct*. We know the police and bureaucrats have the power to inconvenience us temporarily, and so we are strategic; but we do not live in fear of their arbitrary power.³³ We conduct these daily affairs guided by “practical consciousness,”³⁴ meaning we act knowingly but not self-consciously, in that we do not think about the UCC bills and notes sections every time we use the ATM to deposit a check or get cash. Asked to explain why we feel secure conducting our lives this way, we often choose to talk about accountability and, ultimately, about

in countries such as China, Vietnam, and Thailand, the mix of forms varies greatly rather than establishing an “Asian” pattern.

31. Merry, *supra* note 5.

32. PATRICK EWICK & SUSAN SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 15 (1998).

33. At the time this essay was written, a fractious mayoral campaign was developing in Newark, New Jersey between Cory Booker and the incumbent Sharpe James. James was shown engaging in numerous campaign irregularities in a well publicized documentary, *Street Fight*, which I show to my Municipal Law class. James began five terms previously as a reform mayor, but after achieving wide popularity, has been accused of cronyism and using the police to harass his opponents. I ask my students how such a culture could develop — affirmed by re-election — from such promising beginnings. *STREET FIGHT* (Public Broadcasting System 2006).

34. Sociologist Anthony Giddens describes two forms of consciousness which guide our daily lives. One is “discursive consciousness” which is developed from reasons for doing things. The other is “practical consciousness” or the unselfconscious routines that allow us to get dressed and leave for work, open a door, or replace a light bulb without having to think about it. ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* (1986).

the rule of law (or some of us, about the UCC). But through our unselfconscious behavior, we have given meaning to the law before we have reflected on our reasons for doing so.

This is the power of legal consciousness.

IV. MERRY ON LAW AND LEGAL CONSCIOUSNESS

Leading legal anthropologist Sally Engle Merry was one of the first scholars to explore the concept of legal consciousness.³⁵ Her path-breaking article draws on her study of conflict, litigation, and mediation in a New England district court to illustrate the role of legal consciousness in bridging the gap between law-in-action and law-on-the books.³⁶

Professor Merry directs our attention to everyday actions that are shaped by the law and which, in turn, shape the law itself, and in particular to “ideas about what law is and what it can and cannot do.”³⁷ According to Merry, law is not an independent, external factor shaping society. Rather, she says,

. . . law and society are mutually defining and inseparable. One fundamental point is that law is intimately involved in *the constitution of* social relations and the law itself is *constituted through* social relations. Daily talk about the law by ordinary people contributes to defining what law is and what it is not. Ordinary people share understandings of law and the way it affects their lives and defines their relationships. These understandings, which can be called *legal consciousness*, include people’s expectations of the law, their sense of legal entitlement, and their sense of rights.³⁸

Her work has helped to open a new window on our understanding of rights and the dynamic process by which consciousness of rights takes shape. Perceptions of rights, in turn, help to explain why and how the law becomes active or fails to become active in particular individuals’ lives. Drawing on her research on the legal consciousness of ordinary citizens, she observes,

[t]heir ideas were derived from their experiences in court and with lawyers as well as from the media. These ideas, however, were not necessarily the same as the doctrines of the legal system itself. For example, people who sought judicial relief in the law courts for neighborhood problems in the New England towns I studied in the 1980s based their actions on conceptions they had of rights to property and protection — conceptions often at variance with the law itself. Many people felt that they could control who stepped onto their property, and many

35. Merry, *supra* note 5.

36. *See id.*

37. *See id.* at 214.

38. *Id.* at 209–10.

felt entitled to shoot anyone who did. Thus, they held an expanded notion of property rights that were less circumscribed than those actually enforced by the courts.³⁹

Professor Merry's research on mediation of cases in the lowest tier of a court system reveals the power of some actors to shape perceptions and the meaning of law and its relevance to these problems. Their power is the power to give a name to a relationship, a dispute, a conflict, even a personal identity, and, thus, to suggest the relevance — or irrelevance — of law.

Reframing is an aspect of the power of naming—the power to assert what a problem is and what should be done about it. In these settings, naming is done by people who are perceived to hold particular authority by virtue of their institutional location and their professional expertise, often revealed in their language. Consequently, plaintiffs are persuaded to acquiesce to these names, to abandon their efforts to get help from the court for problems defined in legal terms and to accept the court's redefinition of the problem as a social one deserving ongoing supervision of their social relationships.⁴⁰

Neighbors entered the court with a sense of entitlement and the reasonableness of their own actions. But, instead of receiving protection for their entitlements, the parties received "lectures and advice about how to organize their lives, encouragement to come back for mediation, and promises that something will be done to the defendant if the problem recurs."⁴¹ Thus, by exercising their power to reframe an event or a social relationship in a non-legal, moral, and therapeutic discourse,⁴² the court officials denied the very forms of protection and help "promised by the legal system itself" and offered non-legal solutions in their place.⁴³

In other settings that I have studied, for example in my research on the effects of new disability rights and my examination of the implementation of

39. *Id.* at 214.

40. *Id.* at 218. In the law and society research canon, disputes must first be named (i.e. perceived to exist), then responsibility assigned to someone, an entity, to oneself, or to chance ("blaming"), and lastly, a remedy sought through whatever formal or informal means seem to be available ("claiming"). See generally William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC'Y REV.* 631 (1980). Conflicts exist everywhere in society. Yet the number that result in naming — awareness of a grievance — is miniscule, and the proportion that result in blaming or claiming, much smaller still. Perceptions and meanings are critical to the interpretation of social interaction that might be named, blamed, or claimed.

41. Merry, *supra* note 5, at 225.

42. A discourse is more than an explicit invocation of non-legal authority; it conveys a taken-for-granted common sense, a perspective that is complete in itself, by establishing what there is to say about what we perceive. Cf. Michel Foucault, *Politics and the Study of Discourse*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 53, 58–59 (Graham Burchell, Colin Gordon & Peter Miller eds., 1991). A discourse guides how we express what we perceive and, therefore, also influences what we know.

43. Merry, *supra* note 5, at 225.

welfare reform law, discourses were selected less self-consciously and less instrumentally than the discourse used by court officials studied by Professor Merry. The subjects in my research described conflict and conflict resolution using discourses influenced by family, peers, education, media, and an array of other factors which shape cognition with no less powerful an effect.⁴⁴ For example, in a study of the legal consciousness of persons with disabilities, most of the people we spoke to with disabilities could describe the provisions of the Americans with Disabilities Act (“ADA”) in general terms, yet none of them had ever formally invoked the Act to remedy discrimination or to gain access to employment.⁴⁵ Further, our interviewees sometimes chose a discourse to describe exclusion from employment or acts of discrimination in non-legal, yet — to them — compelling terms.⁴⁶ For instance, some described their exclusion using a discourse of religion that emphasized forgiveness without mentioning the law. Others employed a discourse of the market to explain the efficiency, and thus the appropriateness, of a business’s failure to employ them or to offer accommodations, even though that might be contrary to the law. Some of our interviewees, who strongly opposed affirmative action in a racial context, suggested (correctly or incorrectly) that the ADA was similar, and for this reason they would never invoke the ADA’s provisions. For each individual, consciousness of the law was shaped by a variety of factors, including family, peers, and prior experiences in school or at work, that led to widely varied perceptions of rights never anticipated by the drafters of the law.⁴⁷

V. GLOBALIZATION OF LAW

Professor Merry’s illuminating description of the interactive process that shapes perceptions of law can help us understand the cross-cultural migration of rights and legality. Legal consciousness provides a window into the process by which formal legal change takes shape, but something more is needed. Consciousness of rights in developing societies is both a terrain of conflict and the point of intersection between global and local flows of information and advocacy about rights. Research on the impact of global and local advocacy for rights requires examination of the transnational flows of ideas about rights and their translation within each local context.

As the global movement to adopt formal rights, rules of law, and democracy spreads, the meaning of law is framed in discourses from many sources — West-

44. See generally DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES (2003); Frank Munger, *Dependency by Law: Welfare and Identity in the Lives of Poor Women*, in LIVES IN THE LAW 83 (Austin Sarat, Lawrence Douglas & Martha Umphrey eds., 2002).

45. ENGEL & MUNGER, *supra* note 44, at 1–19.

46. See *id.* at 142–67.

47. *Id.*

ern jurisprudence, international human rights agencies, the World Bank and its private counterparts, and dominant political actors, to name some of the most important ones. But the meaning of law is also shaped by the actions and discourses of politicians, media outlets, activists, legal professionals, community leaders, as well as through everyday interactions within networks of friends and family and on the street, namely the sources in closest contact with the citizens in Chinese villages holding elections for the first time,⁴⁸ Thai administrative districts whose governance has been reformed under the new constitution,⁴⁹ or women in villages now protected from discrimination by CEDAW. The meaning of rights or democracy may be translated and transplanted not once, but many times, ending with the local contexts in which they are intended to become part of the consciousness of ordinary people.

Professor Merry's recent book on globalization and transplantation of rights created by CEDAW describes the final and most critical step in the globalization process which takes place locally.⁵⁰ As she puts it, "[i]n order for human rights ideas to be effective . . . they need to be translated into local terms and situated within local contexts of power and meaning. They need, in other words, to be remade in the vernacular."⁵¹ Even so basic a human right as freedom from violence against women has not been easy to establish at this level. The transnational human rights movement to end discrimination against women has provided critical resources for local advocates, but no easy answers for creating rights consciousness among perpetrators or their victims. Professor Merry observes that "human rights ideas" are "embedded in cultural assumptions about the nature of the person, the community, and the state" and "do not translate easily from one setting to another."⁵² Activists must possess a kind of "double consciousness" as they translate human rights concepts between the discourse of the transnational community that "envision[s] a unified modernity" and the discourses of particularism of national and local settings.⁵³

Observing the translation of ideas about gender violence during discussions between national delegates to the United Nations committee, within transnational NGOs, and by local advocates, Merry identified potential dilemmas that arise from differences in perspectives on rights. First, Merry says, "human rights law is committed to setting universal standards using legal rationality, yet this

48. See Jamie P. Horsley, *Village Elections: Training Ground for Democratization*, CHINA BUS. REV., Mar.-Apr. 2001, <http://www.chinabusinessreview.com/public/0103/horsley.html>.

49. CONST. OF THE KINGDOM OF THAIL. § 285.

50. See MERRY, *supra* note 4. Her research on CEDAW implementation included observation of conditions in Hawaii, Delhi, Beijing, Fiji, and Hong Kong.

51. *Id.* at 1.

52. *Id.* at 3.

53. *Id.*

stance impedes adapting those standards to the particulars of local context.”⁵⁴ Universal standards may seem irrelevant to individuals contending with local conditions that were never contemplated by the drafters. Second, “human rights ideas are more readily adapted if they are packaged in familiar [i.e. local and vernacular] terms,” but quickly lose their transformative power as a result because they fail to “challenge existing assumptions about power and relationships.”⁵⁵ Of particular concern in societies with little familiarity with rights of individuals, victims may not perceive, or “name,” discrimination or even violence directed against them as unjust.⁵⁶ As Merry says, “to promote individual rights-consciousness, institutions have to implement rights effectively. However, if there is little rights consciousness, there will be less pressure on institutions to take rights seriously.”⁵⁷

A third dilemma is that human rights have a profoundly ambiguous relationship to the authority of the state itself, challenging the “states’ authority over their citizens at the same time as it reinforces states’ power.”⁵⁸ The dilemma is familiar to American lawyers, but in the United States, lawyers are protected as “officers of the court” even when mounting serious challenges to the state’s own authority. In societies with little experience with liberal legalism, and more importantly, few institutional protections for those who confront the state in the name of rights, conflict with the state can be dangerous, as the fate of the Muslim human rights lawyer in southern Thailand tragically illustrates.⁵⁹

Rights consciousness, in the sense used here, involves the way one perceives the relationships and actions that concern rights. As Merry notes, rights framed in transnational discourse are typically individualistic and universal.⁶⁰ In Europe and America, particular individual rights are valued primarily because they contribute to the political and economic viability of a capitalist economy by protecting property while motivating and enabling voluntary participation by workers.⁶¹ In societies in which social and economic institutions have developed

54. *Id.* at 5.

55. *Id.* Conversely, a problem arises from the fact that “to have local impact, human rights ideas need to be framed in terms of local values and images, but in order to receive funding, a wider audience, and international legitimacy, they have to be framed in terms of transnational rights principles.”

56. On the concept of “naming,” see Felstiner, Abel & Sarat, *supra* note 40. Merry emphasizes this point in her discussion of CEDAW, and illustrates the psychology of naming in her discussions of gender violence. See MERRY, *supra* note 4, at 24–27.

57. MERRY, *supra* note 4, at 5.

58. *Id.*

59. See Public Statement, Amnesty International, Thailand: Angkhana Neelapajit Must be Given Immediate Protection (Nov. 1, 2006), available at <http://web.amnesty.org/library/Index/ENGASA390162006?open&of=ENG-2S3>.

60. See generally MERRY, *supra* note 4.

61. See generally T.H. MARSHALL & TOM BOTTOMORE, CITIZENSHIP AND SOCIAL CLASS (1992). Even the characterization of some rights as “individual,” such as property and freedom of speech, while others

along different paths, other "individual" rights may seem compelling, for example rights to maintain family or community relationships or to maintain religious practices and other taken-for-granted features of family and community life.⁶²

Gender inequality exists in virtually all societies, but in many so-called "traditional" societies, practices forbidden by the transnational community's interpretation of CEDAW's language may be permitted by local custom and even by national or local law. Women themselves may be reluctant to change such practices because they are granted respect or status for submitting to them or because they will be punished for violating them. In Hong Kong, for example, the struggle for gender equality under inheritance laws became entangled with arguments about preserving the traditional family.⁶³ Even violence may be perceived as an acceptable form of "discipline" for transgression of traditional rules of behavior.⁶⁴ Over a lifetime, identity as a woman may be strongly influenced by adherence to customs that maintain a woman's status as subordinate and an object of violence. In some instances, such practices may not be perceived as unjust, or, even if perceived as unjust, as having a dual character because the woman is both a subject of rights and a subject of the conventions of family relationships. Like persons with disabilities who know about the ADA but may adopt another discourse to describe exclusion, Merry discovered that women in several societies faced difficult choices when their rights-based opposition to discriminatory practices seemed to undermine other important local aspects of family and community life.

For women who wanted to change the way they are treated *within* existing family and community relationships, a human rights framework

does not displace other frameworks but adds a new dimension to the way individuals think about problems . . . rights are only one way of thinking about their injuries and about justice. Many women in these two places attributed their injuries to their relatives' failure to abide by the norms of kinship and care.⁶⁵

In other words, the women possessed "a double subjectivity as rights-bearers and as injured kinsmen and survivors . . . two somewhat distinct sets of ideas and meanings that coexist."⁶⁶ Double subjectivity has profound implications for the global implementation of human rights. Rights permit the victims of discrimina-

are characterized as "collective," such as food or shelter, is historically and culturally specific. Food and housing may be no less legitimate individual rights, but they would require far greater restructuring of our basic institutions; institutions already structured to preserve property and guarantee political participation.

62. See *supra* note 32 and accompanying text.

63. MERRY, *supra* note 4, at 202-03.

64. *Id.* at 25.

65. *Id.* at 180.

66. *Id.* at 181.

tion and oppression to step outside the framework of existing relationships, but then they often find themselves perceived and treated as outsiders.⁶⁷

Even where the victims have embraced rights consciousness, the interweaving of rights and local institutions may create other strategic dilemmas. For example, Hindu women facing discrimination under Hindu customary law found that their advocacy for universal rights and opposition to customary law quickly became identified with intolerant Hindu conservatives' attempts to deny autonomy to the Muslim minority to follow their own customary practices.⁶⁸ Fijian women who opposed customary village mediation practices, which permitted avoidance of serious punishment for crimes such as rape, were confronted with the importance of mediation in preserving village life.⁶⁹

On balance, the willingness of an individual to sustain a rights framework "depends in part on the way institutions respond to their rights claims."⁷⁰

If their claims are treated as unimportant, unreasonable, or insignificant, they are less likely to take a rights approach to their problems. On the other hand, if their experience of claiming rights is positive, in that institutional actors support and validate these claims, they are more likely to see themselves as rights-bearing subjects and to claim rights in the next crisis. . . . Poor women think of themselves as having rights only when powerful institutions treat them as if they do.⁷¹

Thus, "[i]t is not unusual for individuals to retreat from a rights consciousness of grievance to a kin-based one. Nor is it surprising that one would try on this identity, drop it, and try again."⁷²

This conundrum — the reciprocal effect of rights consciousness and effectiveness of rights — poses a particularly important and complex challenge for human rights advocates. Professor Merry places this dilemma in a practical light. Women may know about new rights that protect them from violence; at the same time, they have learned to deal with oppressive, sometimes violent, relationships as matters of kinship and custom imposed and overseen by others — the family, the village, or the religious community. These dual discourses have different implications for understanding how these women perceive their identities and for determining important continuing relationships. Rights that work for them will alter their perception of rights, the rule of law, and perhaps even of themselves. Rights that are not taken seriously by authorities soon diminish in importance

67. See *id.* at 16; see also Barbara Yngvesson, *Re-examining Continuing Relations and the Law*, 1985 WIS. L. REV. 623, 630.

68. MERRY, *supra* note 4, at 105.

69. *Id.* at 117.

70. *Id.* at 215.

71. *Id.*

72. *Id.* at 217.

and have less of a role in shaping consciousness of alternative courses of action or identity.⁷³ The conundrum is: Where does the cycle begin? Most civil rights laws depend largely on complaints by victims.⁷⁴ The victim must make a strategic choice among alternatives that have uncertain outcomes. Merry's fieldwork shows that it is here that the dynamics of social interaction play an important role in establishing features of every day life that are taken for granted or by creating possibilities for new perceptions.⁷⁵ "Taking on rights," Merry concludes, "is a difficult process and fraught with ambivalence. Asserting rights often comes at a price."⁷⁶

At every level of discourse described by Merry — at the U.N., national program development, and local implementation — rights are contested, resisted, strategically reinterpreted, and ignored. Yet, Professor Merry's research shows that rights have the capacity to give meaning to social relationships and to influence unselfconscious social behavior. By examining CEDAW, she sought to understand how contentious rights debates might (or might not) lead to reduction in practices that were discriminatory or violent toward women.⁷⁷ Change occurred in many societies, although unselfconscious and uncontested equal treatment of women remains a distant goal. The most promising path, she concludes, involves use of local knowledge of customs and values to facilitate adaptation and accommodation rather than coercive implementation of the transnational community's vision of universal rights.⁷⁸

VI. THE RULE OF LAW IN THAILAND

Like CEDAW, Thailand's new constitutional provisions for rights and democracy are formal, "top down" prescriptions, and like CEDAW, Thailand's constitutional language was negotiated by a committee at the center of broader interactions among many national and transnational participants. Unlike CEDAW, however, Thailand's constitution reflects a long history of "bottom up" pressure for democracy and the "right to have rights." Thailand's constitutional language derives meaning from Thai legal culture and political history as well as

73. Indeed, local authorities are unlikely to support human rights consciousness until they themselves perceive the treatment of women in terms of rights and believe in taking them seriously.

74. With this problem in mind, CEDAW requires annual reports by signatories and invites critique by NGOs and the members of an oversight body in order to promote compliance without exclusive reliance on victims. Significantly, comparison of the effectiveness of civil rights laws in the United States suggests that government-initiated processes, such as those prescribed by the Voting Rights Act, have been far more effective in eliminating race discrimination than those which rely on victims to bring compliance lawsuits. See generally RICHARD LEMPERT & JOSEPH SANDERS, *AN INVITATION TO LAW AND SOCIAL SCIENCE: DESERTS, DISPUTES, AND DISTRIBUTION* (2d ed. 1989).

75. See generally MERRY, *supra* note 4.

76. *Id.* at 216.

77. *Id.* at 21–27.

78. See *id.* at 227–29.

from the transnational flow of ideas and advocacy. Recent surveys suggest that concepts like democracy and rule of law are familiar to most Thai, although they are not necessarily understood in the way that they are by the transnational community.⁷⁹

Merry's research on globalization of rights holds many lessons for a study of the evolving role of rights in Thailand. "Translating rights into the vernacular" is Merry's shorthand for the process that involves translating rights into local contexts, which gives shape to the effects of those rights. First, rights must make sense to the rights bearer. That is, the rights bearer must perceive the possibility of benefits from "taking on" rights. This translation may involve interpretation of rights to fit a local context, by giving a contextual meaning to "injury," "discrimination," or "inequality." Rights may seem irrelevant when the individual perceives no wrong or injury, and those rights may be rejected when the price of changing ongoing relationships appears to be too great. Rights advocates hope that rights will be respected and accommodated with a minimum of change in the desirable qualities of ongoing relationships, but this outcome has been rare in the implementation of women's rights. Second, shaping rights to fit local contexts is facilitated by translators who acquire power over when and how rights become active. Merry's anthropology of rights in a New England court describes judicial power to prevent complainants from obtaining a remedy for the violation of their rights and instead to seek a compromise by choosing a therapeutic rather than legal discourse. Her research on women's rights in five societies suggests the power of a broad range of local translators as well as translators at higher political and institutional levels.⁸⁰ These steps — individual perception, culture, ongoing relationships, and translation — provide starting points for research on rights consciousness and the power of translators to facilitate or impede its development.

In my concluding section, I describe two ethnographic studies of recent struggles over the rule of law in Thailand to illustrate the usefulness of Merry's anthropological approach to rights consciousness. The first is a study of local elections conducted shortly before constitutional reform in rural villages in Thailand.⁸¹ The research suggests that old patterns of deference may not be altered by the renewed emphasis on election integrity in formal constitutional language.

79. See Albritton & Bureekul, *supra* note 23.

80. Professor Merry's research was conducted in Hawaii, Delhi, Beijing, Fiji, and Hong Kong.

81. The new Constitution establishes an independent election oversight commission intended to reduce vote buying and other forms of corruption. CONST. OF THE KINGDOM OF THAIL. §§ 136–148. While the commission has had some success, some observers contend that there is no reason to believe that election practices have been radically altered as a result of constitutional reform. Scholars still debate whether survey data demonstrate that corruption is a continuing problem or a problem that has been greatly exaggerated. For a helpful analysis of the problems of measurement and interpretation see Albritton & Bureekul, *supra* note 23, at 39. Post-reform election practices await further careful ethnographic research.

The second study describes the emergence of a social movement of impoverished villagers in Northeast Thailand to protect their homes and livelihood from deforestation, dam building, and other massive development projects. The rise and success of this movement suggests that under the proper conditions, participation and justice can be given meaning by non-electoral means and through the initiative of ordinary people, but rights might play a limited role.

An ethnographic study of village democracy in rural northern Thailand found that a traditional discourse of reciprocal obligations between patrons and clients created an alternative framework for perceiving authority and legitimacy that is different from the transnational meaning of democracy or rule of law.⁸² Patron-client relationships prevalent in Thailand, as well as in many other Asian and Latin American societies, create continuing bonds of reciprocity. Instead of voting for candidates on the basis of promises to serve the public and obey the law for which they will be held accountable, some voters displayed loyalty to candidates with whom they have a continuing patron-client relationship. A candidate in a position of power as an employer, land-holder, or respected village leader may have created many clients. Further, other relationships may likewise create a sense of obligation among some voters, such as a candidates' financial support for a temple and endorsement by its principal monk. While critics point to the widespread practice of vote buying by candidates, surveys reveal that many voters do not perceive this practice as a form of corruption. One scholar suggests that the proper understanding of such payments is that they play into the tradition of reciprocity created by patron-client relations and are perceived as creating an obligation rather than as a payoff to ignore a civic responsibility.⁸³

We might describe this as paternalistic democracy. Voters choose a candidate with whom they have a reciprocal relationship rather than evaluating the candidate's ability or past performance. A vote may be an expression of loyalty, not a civic judgment. Voters may believe (but we will not know without more research) that an elected official is entitled to his or her office and non-accountable. It is possible that personal gain, preferential treatment of relatives and business associates, and other self-serving acts common among local office holders, are considered irrelevant to this relationship, and may have little effect on the legitimacy of the office-holders' authority. Likewise, the particular relationship between

82. In most societies, including our own, there are alternative discourses about responsibility for the well being of others and about responsibility for injury to others. My study of the ADA found that the barriers created by a disability were sometimes perceived in non-legal terms that rendered the law irrelevant or inappropriate. See ENGEL & MUNGER, *supra* note 44, at 142-67. Professor Merry similarly found that CEDAW implementation encountered alternative discourses about women's roles in society that seemed to conflict with CEDAW's underlying values. MERRY, *supra* note 4, at 8. CEDAW is grounded in a secular belief that women should be equal to men, socially autonomous, and free of oppressive relationships, but one or more of these prescriptions often conflicts with valued local traditions.

83. DANIEL ARGHIROS, *DEMOCRACY, DEVELOPMENT AND DECENTRALIZATION IN PROVINCIAL THAILAND* 230 (2001).

supporters and office-holders may legitimate favoritism, so that candidates are not expected to serve the general public but rather the interests of loyal clients. If such interpretations prevail (and we do not yet know the answer), Thailand's practices of democracy and the rule of law may be embedded in traditional patron-client relationships and function differently from democracy and the rule of law in societies where these practices are thought to be corrupt, even though they occur with some regularity.⁸⁴

A second ethnographic study describes emergence of a movement to resist displacement from the land in Thailand's rural Northeast. Calling itself the "Assembly of the Poor," the movement is the latest of several movements that reflect the growing economic marginalization of agricultural communities during Thailand's industrialization from the 1960s to the present. The Thai word meaning "assembly" was deliberately chosen to evoke the succession of rural movements over the previous twenty-five years that also called themselves "assemblies." The movement reflects not only the growing activism among rural Thai and the effectiveness of the committed NGO organizers who have assisted them, but also the special meaning of the environment in Thai culture.⁸⁵ Respect for the environment is deeply embedded in Buddhism, and Buddhism in turn is one important element of the culture that underlies Thai legality.⁸⁶ The underlying culture, Thailand's "civic religion," also includes discourses of national identity, and the monarchy.⁸⁷ The civic religion establishes taken-for-granted values and ideas that are fundamental to political exchange about the welfare of the Thai people and legitimate use of authority, and it provides a powerful discourse for social movement participants as well as officials, politicians, and other power holders.⁸⁸ Buddhist values embedded in the discourse of Thai national welfare

84. The thoughtful observer may see a similarity between paternalistic democracy, as I have described it in Thailand, and loyalty of American voters to parties or to patronage. These apparent similarities raise important questions about what it means to establish a civic culture that creates a meaningful democracy. The answer has to do with trust in the electoral system. American voters may violate the norm of civic responsibility, but they do so knowing they have the power to "vote the bastards out." And they do vote them out with some regularity. In Thailand, this idea of civic behavior — and of the possibility of accountability — may still be taking shape. Some Thai voters described in the study may believe they are obligated to vote for a patron or vote buyer while others may believe that voters have no legitimate role in directing office holders' performance of their job.

85. Some parts of rural Thailand, especially the impoverished, ethnographically distinct Northeast, have had a long relationship with NGO workers who have encouraged rights consciousness. See Prudhisan Jumbala & Maneerat Mitprasat, *Non-governmental Development Organizations: Empowerment and Environment*, in *POLITICAL CHANGE IN THAILAND: DEMOCRACY AND PARTICIPATION* 195 (Kevin Hewison ed., 1997).

86. See Philip Hirsch, *Environment and Environmentalism in Thailand: Material and Ideological Bases*, in *SEEING FOREST FOR TREES: ENVIRONMENT AND ENVIRONMENTALISM IN THAILAND* 15, 33 (Philip Hirsch ed., 1997); see also Frank Reynolds, *Dhamma in Dispute: The Interactions of Religion and Law in Thailand*, 28 *LAW & SOC'Y REV.* 433 (1994).

87. Reynolds, *supra* note 86, at 440–42.

88. *Id.* at 443–44.

can be mobilized by environmental movements to greater advantage than civil rights or property rights that might be considered more fundamental in Europe or the United States. Social change in Thailand provided an opportunity for the leaders of the Assembly of the Poor to deploy Buddhist environmental values to support their claim that the movement represented the nation in its struggle against the devastating and illegitimate forces of development. The claim drew support not only from other beleaguered villagers, but also from the increasingly politically active middle class.

The engine of social change has been Thailand's booming economy following the end of the Vietnam War and the decline of communist influence in the rural areas of Eastern Thailand.⁸⁹ Rapid growth accelerated exploitation of timber, waterways, and other natural resources, has had two profound political effects. First, the former political periphery, including the rural poor and ethnic minorities living within the forests, or on its margins, or whose villages were in the future floodplain of a proposed dam, has become politically active. After years of contact with activist NGO workers, they have been motivated to seek redress from the government, and if none is forthcoming, to undertake direct action to save their homes and livelihoods.⁹⁰ They have been supported by international human rights and environmental NGOs opposing massive development projects worldwide that are planned and carried out without input from the communities they destroy. A particular target of NGO opposition has been one of the world's chief dam builders, the World Bank, a source of funding for the Pak Mun Dam in Northeast Thailand, which threatened to inundate many villages and became the focus of the Assembly of the Poor's most widely known campaign.⁹¹

Thailand's boom has had the further effect of increasing the size of Thailand's "middle class." Although Thailand's varied social strata do not correspond easily to Europe and America's property owners and salaried tiers, an emerging middle class comprised of salaried and professional workers in government, universities, and industries, together with the rapidly growing numbers of entrepreneurs, is beginning to flex its political muscle. They support causes that express their values and their often critical views of government. On one hand, the environmental movement has been characterized by rural activism, supported by transnational and Thai NGOs and, significantly, activist monks whose actions and words mobilize the Thai civic religion with great power. On the other hand, a more technocratic, non-confrontational environmentalism is supported by

89. See Philip Hirsch, *The Politics of Environment: Opposition and Legitimacy*, in *POLITICAL CHANGE IN THAILAND: DEMOCRACY AND PARTICIPATION* 179 (Kevin Hewison ed., 1997); see also Hirsch, *supra* note 88.

90. See Jumbala & Mitprasat, *supra* note 85; see also BRUCE MISSINGHAM, *THE ASSEMBLY OF THE POOR IN THAILAND* (2003).

91. MISSINGHAM, *supra* note 90.

the contributions of the “salariat,”⁹² including entrepreneurs who have found environmentalism a useful cause, and by transnational NGOs advocating “sustainable” or “responsible” development.⁹³ Like environmentalism in the late 1960s in the United States⁹⁴ and the activism for women’s rights in countries which Merry studied,⁹⁵ environmentalism in Thailand has brought together urban and rural, middle class and economically marginal, and rights conscious middle class Thai and more traditional rural Thai, notwithstanding survey data that reveal differences between their general perspectives on participatory democracy and the rule of law.

After a long campaign by the Assembly of the Poor in opposition to the Pak Mun Dam, demonstrations and petitioning by the Assembly of the Poor achieved its greatest visibility just as the drafting of the new constitution reached its final stages. Perhaps as a result of this growing political activism in Thailand on these two broad fronts — rural activism and middle class mobilization — the 1997 constitution provides special protections for environmental rights and for public participation in environmental decision-making.⁹⁶ Thai environmentalism may be consistent with international rights advocacy but it also has roots in movements like the Assembly of the Poor that draw on non-legal perceptions of justice and local claims grounded in unofficial law — the law of custom and tradition in rural communities.⁹⁷ Perceptions of the environment that prevail in rural communities and resonate with traditional Thai culture have had their influence, combining the language of customary law and justice with the technical language of sustainable development to contest the power of the government. Thus, political activism is beginning to give meaning to participatory democracy through practices that will evolve step by step, adapting the universal rights framework to the complex and varied Thai culture and Thai institutions.

These are case studies of “translation into the vernacular,” and they draw attention to the power of the translators, or interpreters, of social injustice, rights, and the meaning of democracy. Some local election practices may reinforce ex-

92. Pasuk Pongpaichit & Chris Baker, *Power in Transition: Thailand in the 1990s*, in *POLITICAL CHANGE IN THAILAND: DEMOCRACY AND PARTICIPATION* 21, 32–35 (Kevin Hewison ed., 1996). Pongpaichit and Baker use this term to describe one of the relatively educated and well to do groups that make up the middle class in Thai society.

93. Jumbala & Mitprasat, *supra* note 85.

94. *See generally* KIRKPATRICK SALE, *THE GREEN REVOLUTION: THE AMERICAN ENVIRONMENTAL MOVEMENT, 1962–1992* (1993).

95. MERRY, *supra* note 4, at 208–17.

96. CONST. OF THE KINGDOM OF THAIL. §§ 56, 59.

97. In terms suggested by Santos, *supra* note 11, at 63. Environmental rights link local perceptions of justice to transnational environmentalism. The linkage includes transnational environmentalism associated with pro-development interests, but also to progressive transnational conceptions that include respect for local determination and participation. Santos and Rodriguez-Garavito call this mix of transnational human rights and local liberatory interpretation “subaltern cosmopolitan legality.” *Id.* at 44.

isting hierarchies of deference and power-holding unless a persuasive translator reinforces the belief that office holders are accountable to voters and to the law. The establishment of a unique National Election Corruption Commission by the new constitution shows that the drafters understood that the translation of democracy into practice would have to be regulated. The Assembly of the Poor succeeded in part because movement leaders translated the movement's social justice claims into a traditional discourse of responsibility to the environment that pre-dated the constitution and was more meaningful than a legal discourse borrowed from international environmental rights advocates. Voters and movement participants who "take on" rights make difficult choices, and translators who influence perceptions of risks and benefits play a critical role. Success is critical as well. As Merry observed, when rights succeed, rights consciousness is reinforced; when they do not succeed, individuals may be more reluctant to take them on the next time, and rights consciousness weakens.

Finally, the two case studies show that the process by which rights take hold is variable. The local context in which transplanted institutions or rights are deployed creates strategic choices for the Thai who accept, reject, or reinterpret the alternatives they are afforded by their new rights. Democracy as it is perceived by some Thai voters can be understood only in the context of a unique meaning of paternalistic representation. Likewise, social justice among the rural poor was grounded in the unique importance of the environment rather than a general belief in rights or democracy. We are learning a great deal about the different ways that rights can be perceived in other cultures. This variation was anticipated by Merry's observations of New Englanders, who constituted local property rights in a unique way. As we apply the methods of legal anthropology to law in developing societies, we are proceeding down a path blazed by the research of law and society scholars who have studied how rights become active in our own society, and whose methods and insights may now help us understand the prospects for the development of rights throughout the world.

NEW YORK LAW SCHOOL LAW REVIEW